Pine Brook Care Center, Inc. *and* Local 1040, Communications Workers of America, AFL–CIO. Cases 22–CA–19358, 22–CA–20063, and 22–CA–20373

December 19, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 7, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) unilaterally transferring charge nurse duties from employees in the registered nurses' (RNs) unit represented by the Union to nonunit licensed practical nurses (LPNs); (2) withdrawing recognition from the Union as the collective-bargaining representative of the RNs; and (3) unilaterally changing the terms and conditions of employment for the employees in the RN unit.[2] We also agree with the judge's finding that the unit RNs are not statutory supervisors within the meaning of Section 2(11) of the Act. This finding and the judge's analysis are consistent with the Board's decisions in *Providence Hospital*, 320 NLRB 717 (1996), and *Ten Broeck Commons*, 320 NLRB 806 (1996).

Because the RNs are employees and not supervisors under the Act, the Respondent's transfer of charge nurse work to LPNs involved only a transfer of unit work to nonunit employees at the same facility. The Respondent does not contest the judge's finding that this transfer of unit work was a mandatory subject of bargaining. Therefore, we find it unnecessary to rely on the judge's discussion of *Dubuque Packing*, 303 NLRB 386 (1991), and *Otis Elevator Co.*, 269 NLRB 891 (1984), because, as the judge noted, those are cases that simply "distinguish between management decisions which constitute mandatory subjects of bargaining and those that do not."

The General Counsel has excepted to the judge's finding that the Respondent's charge nurses are supervisors under Section 2(11) of the Act. We find merit in this exception. It is well established that the burden of proving supervisory status is on the party asserting it.[3] Thus, the burden was on the Respondent to prove the supervisory status of the charge nurses. We find that the Respondent failed to meet that burden. The only evidence presented by the Respondent to support its contention that the charge nurses are statutory supervisors was a 10-year-old list allegedly stating the charge nurses' duties, which it introduced during its cross-examination of Jean Baker, an RN. RN Baker, the only witness questioned about the list, explained that the list was very outdated, that she had not seen it since 1985, and that no one from management had ever discussed it with her since that time. In fact, no evidence was presented to establish that the Respondent ever relied on the list or that its contents were an accurate description of charge nurse duties. We find that this scant evidence is insufficient to establish that charge nurses are supervisors. Moreover, the Respondent contended that all RNs are supervisors, yet presented no evidence to differentiate between the duties of RNs and those of charge nurses. As mentioned above, the judge found, and we agree, that the RNs are not supervisors.[4] Accordingly, we reverse the judge's finding that the charge nurses are supervisors under Section 2(11) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Pine Brook Care Center, Inc., Englishtown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring charge nurse duties from employees in the collective-bargaining unit represented by Local 1040, Communications Workers of America, AFL–CIO to nonunit employees.

[1] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] The judge found that "there is no evidence one way or the other" whether the Respondent's changes in unit employees' terms and conditions of employment were made with or without notice to the Union, and that because the Respondent "had previously repudiated this bargaining relationship" with the Union, "it is not necessary to establish that these changes were made unilaterally." We find, however, that the record shows that the changes were made unilaterally and without notice to the Union. Thus, record evidence establishes that the Respondent withdrew recognition from the Union in August 1994, and that the Respondent thereafter notified employees that "the Union no longer represents you" and listed the new terms and conditions under which they would work.

[3] *Chevron U.S.A., Inc.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F.3d 107 (9th Cir. 1994); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985); *Tucson Gas & Electric Co.*, 241 NLRB 181, 181 (1979).

[4] Because we have found neither the RNs nor the charge nurses to be supervisors, we find it unnecessary to rely on the judge's discussion of *Gratiot Community Hospital*, 312 NLRB 1075 (1993), and *Arizona Electric Power Corp.*, 250 NLRB 1132 (1980).

(b) Withdrawing recognition from the Union as the collective-bargaining representative of its RN employees in an appropriate unit at a time when it lacked an objective good-faith doubt of the Union's majority status.

(c) Changing the terms and conditions of employment of its RN employees without first notifying the Union of these changes and, on request, bargaining with the Union about these terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes it made in about June and July 1993 when it transferred charge nurse duties from employees in the RN unit described below to LPN employees, and notify the Union, in writing, that this has been done.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regularly scheduled part-time Registered Nurses, including charge nurses and the In-Service Coordinator, employed by us at our Englishtown, New Jersey facility, but excluding all other professional employees, licensed practical nurses, office clerical employees, managerial employees, guards and supervisors as defined in the Act, employees represented by other labor organizations, and all other employees.

(c) Rescind the changes in unit employees' terms and conditions of employment that it has made since about July 1994, and notify the Union, in writing, that this has been done.

(d) Make whole each of its unit employees for any losses that they suffered as a result of the Respondent's unilateral changes in the following terms and conditions of employment: sick days, vacation days, holidays, personal days, working hours, health insurance, uniform allowances, meal allowances, longevity pay and premium pay for holidays, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of money owed to these unit employees.

(f) Within 14 days after service by the Region, post at its Englishtown, New Jersey facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally transfer charge nurse duties from employees in the collective-bargaining unit represented by Local 1040, Communications Workers of America, AFL–CIO to nonunit employees.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of our RN employees in an appropriate unit when we lack an objective good-faith doubt of the Union's majority status.

WE WILL NOT change the terms and conditions of employment of our RN employees without first notify-

ing the Union of these changes and bargaining with the Union about these terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes we made in about June and July 1993 when we transferred charge nurse duties from employees in the RN unit described below to LPN employees, and WE WILL notify the Union, in writing, that this has been done.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regularly scheduled part-time Registered Nurses, including charge nurses and the In-Service Coordinator, employed by at our Englishtown, New Jersey facility, but excluding all other professional employees, licensed practical nurses, office clerical employees, managerial employees, guards and supervisors as defined in the Act, employees represented by other labor organizations, and all other employees.

WE WILL rescind the changes in unit employees' terms and conditions of employment that we have made since July 1994, and WE WILL notify the Union, in writing, that this has been done.

WE WILL make whole each of our unit employees for any losses they have suffered as a result of our unilateral changes in the following terms and conditions of employment: sick days, vacation days, holidays, personal days, working hours, health insurance, uniform allowances, meal allowances, longevity pay, and premium pay for holidays, plus interest.

PINE BROOK CARE CENTER, INC.

William Milks, Esq., for the General Counsel.
Stuart Bochner, Esq. and *Steven Horowitz, Esq. (Horowitz & Pollack)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 30 and 31, 1995, in Newark, New Jersey. The consolidated complaint here was based on unfair labor practice charges filed on July 29, 1993,[1] and August 1, 1994, by Local 1040, Communications Workers of America, AFL–CIO (the Union). The complaint alleges that Pine Brook Care Center, Inc. (Respondent), which operates a nursing home/health care facility, transferred charge nurse duties from unit employees to nonunit employees on about May 1, without notice to, or prior bargaining with, the Union, and informed the Union, on about June 15, 1994, that it would not bargain with the Union, and on about August 4, 1994, withdrew recognition of the Union as the collective-bargaining representative of the unit. The complaint further alleges that from about July 1994, Respondent changed the contractual and noncontractual benefits of its employees in this unit, including their sick days, vacation days, personal days, holidays, health insurance, work hours, uniform and meal allowances, longevity pay, and premium pay for holidays, also without prior notice to, or prior bargaining with, the Union. It is alleged that this conduct violated Section 8(a)(1) and (5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

On July 16, 1982, the Board certified the Union as the representative of Respondent's employees in the following unit:

> All full-time and regularly scheduled part-time Registered Nurses, including charge nurses and the In-Service Coordinator, employed by the Employer at its Englishtown, New Jersey facility, but excluding all other professional employees, licensed practical nurses, office clerical employees, managerial employees, guards and supervisors as defined in the Act, employees represented by other labor organizations and all other employees.

The last collective-bargaining agreement between the parties was effective for the period April 12, 1991, through April 11, 1994, and is hereafter referred to as the Agreement.

Respondent employs different classifications of employees who are involved in patient care at the facility: registered nurses (RNs), licensed practical nurses (LPNs), and nursing assistants (aides). The RNs, comprising a unit of about five employees, are represented by the Union; the aides are represented by a different union. The hierarchy at the facility above the RNs is the supervisors, the assistant director of nursing, the director of nursing, and the administrator of the facility.

A. *Alleged Change Regarding Charge Nurses*

The complaint alleges that, on about May 1, Respondent transferred charge nurse duties from unit employees to nonunit employees without prior notice to or bargaining with

[1] Unless indicated otherwise, all dates referred to here relate to the year 1993.

the Union in violation of Section 8(a)(1) and (5) of the Act. The substance of this allegation is that this work was taken from the RNs and given to LPNs. As stated above, charge nurses are included in the recognition provision of the Agreement, although the Agreement does not provide for a different pay rate for the charge nurses. The Union filed a grievance with Respondent dated August 25 alleging:

> Recently, several RNs left their employment at Pinebrook and were replaced with LPNs carrying out in some cases charge nurse duties. This constitutes a unilateral change to accepted procedures.

George White, staff representative of the Union, testified that he filed this grievance because some RNs had been replaced by LPNs, without any prior warning from, or discussion with, the Respondent. By letter dated September 10, counsel for Respondent wrote the Union that it denied this grievance. By letter dated September 3, counsel for Respondent wrote to the union president:

> On September 1, 1993, I advised George White of your Union that the Employer is contemplating the elimination of the use of non-supervisory registered nurses and is offering to negotiate the effects of this entrepreneurial decision. This decision is based on the fact that RNs at this facility have historically performed many of the functions and duties currently being performed by LPNs.
>
> If you would like to discuss this matter, please feel free to contact the undersigned at the above address.

On about September 1, Respondent posted the following notice at the doorway entrance to its facility:

> LPN CHARGE NURSE POSITION
> CHARGE NURSE POSITION
> 100 WING
> OPEN TO ALL LPN'S WISHING TO APPLY
> POSITION-REMAINS FULL TIME WITH EVERY OTHER WEEKEND OFF
> PLEASE SUBMIT APPLICATIONS TO;
> MARYLOU MISHLER, DIRECTOR OF NURSING

Victoria Grzelak, who has been employed by Respondent as an RN for 5 years, and Jean Baker, who has been employed by Respondent as an RN for 10 years, testified that Helen Witkowski, an RN, had been employed as a charge nurse at the facility in June, when she took a vacation. When she returned from the vacation her position had been given to Diane Costello, an LPN. In about July, another RN employed as a charge nurse, Marge Madula, left Respondent's employ and was replaced by an LPN, Marianne Panico. Prior to that time, only RNs had been employed as charge nurses. Grzelak testified that the charge nurse is responsible for some mandated paperwork, seeing that the floor is taken care of, and that the residents are being fed. In addition, she prepares the day-shift form. The witnesses used the terms medication nurse and staff nurse interchangeably to describe an RN at the facility who was not a charge nurse or a supervisor. They are responsible for doing medications, checking vital signs, and are in immediate charge of the residents in their wing. Baker testified that charge nurses have more authority, responsibility, and paperwork than do the staff nurses at the facility. She identified a document entitled "Pine Brook Nursing Home Charge Nurse Qualifications," which she testified she signed when she began working at the facility in about 1985. This document lists 23 "Responsibilities" of a charge nurse, including, inter alia:

> 1. Organizing, maintaining and directing nursing activities on individual unit during each tour of duty.
>
> . . . .
>
> 3. Responsible for the total nursing care of patients on unit during her tour of duty.
>
> . . . .
>
> 11. Participates in making out the nursing assistant work schedules.
>
> 12. Makes out daily nursing assistants assignments.
>
> 13. Supervises the Nursing assistant work and has authority to evaluate, correct and discipline if necessary.
>
> 14. Participates in Nursing Assistant evaluations.
>
> 15. Participates in the orientation programs for new nursing personnel.
>
> . . . .
>
> 20. Participates in monthly staff meetings and inservice programs.

B. *Withdrawal of Recognition*

The complaint alleges that on about June 15, 1994, Respondent informed the Union that it would not bargain with the Union, and on about August 4, 1994, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the unit. Respondent's answer admits this allegation. The sole testimony on this subject is the following testimony of Grzelak:

> Q. Directing your attention to August of 1994, are you aware of whether or not the employer refused to deal with the Union any further?
>
> A. Yes, as a matter of fact . . . on August 4th is when the announcement was made to us that they no longer would have anything to do with us, and that was it. Goodbye.

C. *Unilateral Change in Terms and Conditions of Employment*

It is alleged that beginning in about July 1994, Respondent changed the contractual and noncontractual benefits of unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of the conduct.[2] The subjects in-

[2] By order consolidating cases and amendment to first amended consolidated complaint, dated January 11, 1995, the Region alleged that Respondent changed these terms and conditions of employment on about December 15, 1994. At the opening of the hearing here, counsel for the General Counsel moved to amend the complaint to change the time to about July 1994, and to add uniform and meal allowances, longevity pay, and premium pay for holidays. Counsel for Respondent objected to the amendment as being outside the scope of Sec. 10(b) of the Act and that he had no prior notice of the amendment. I granted the amendment, while giving counsel for Respondent leave to reargue the matter in his brief, and I notified him that if he felt that he was prejudiced by the amendment, I would grant a request to adjourn the case if he needed additional time to

Continued

volved are sick days, vacation days, holidays, personal days, working hours, health insurance, uniform allowances, meal allowances, longevity pay, and premium pay for holidays, all of which are allegedly mandatory subjects of bargaining. Grzelak testified that she received the following memorandum from Respondent with her paycheck on December 15, 1994, addressed to "All Staff RN'S from Gordon Nedwed, Respondent's Administrator," on the subject of benefits, stating: "In light of the expiration of the Contract and the fact that the Union no longer represents you in your Supervisory capacity, here are the terms and conditions you will work under." The attached memo states:

11/08/94

Pine Brook Care Center

RN BENEFITS

7.5 HOURS PER SHIFT
12 SICK DAYS PER YEAR
2 WEEKS VACATION PER YEAR
9 HOLIDAYS

NEW YEARS
MARTIN LUTHER KING
PRESIDENT'S DAY (LINCOLN)
MEMORIAL DAY
4TH OF JULY
BIRTHDAY
LABOR DAY
THANKSGIVING DAY
CHRISTMAS

2 PERSONAL DAYS (ONE EVERY 6 MONTHS)

HEALTH INSURANCE

SINGLE COVERAGE AFTER 90 DAYS
FAMILY COVERAGE AFTER 6 MONTHS IF NEEDED

Article VIII of the Agreement, "Holidays," provides for 12-paid holidays, 2 of which (Christmas Eve and New Years Eve) are only for the 3–11 p.m. shift of the unit employees. The other holidays specified in the Agreement, but not the memo are Good Friday or Yom Kippur. The Agreement provides that employees employed less than 1 year receive 10 sick days; 1 to 4 years; 12 sick days; 5 to 10 years, 13; 11 to 15 years, 14; and 15 years and over, 15 sick days. The Agreement also provides for 3 personal days leave each year, and paid vacations ranging from 2 weeks (for employees with up to 1 year of employment) to 5 weeks (for employees with in excess of 10 years employment). The health insurance provision of the Agreement provides as follows:

> The Employer shall provide, at no cost to the employee, Blue Cross/Blue Shield Medallion (or a better) Plan and Rider "J" to the employees and seventy-five percent (75%) of costs for dependents. After one year of service, the Employer shall pay 100% of the cost.

Grzelak testified that during the term of the Agreement, Respondent paid employees premium pay for holidays, and the Agreement provides that the Respondent had to pay employees time and a half, plus regular pay for the day, for the designated holidays. She testified that in 1995 she was not paid premium pay for New Years Day and Martin Luther King's birthday. Baker testified that, in the past, Respondent paid its RNs longevity pay each year on about July 15, but it was not paid in 1994. Respondent has also paid its RNs uniform allowances, half in April and half in September, but Respondent has not made this uniform allowance payment since April 1994. Respondent had also paid a $2 nightly meal allowance to its night nurses to compensate them for the fact that the facility's cafeteria was closed at night; that allowance ended in December 1994. No evidence was introduced to establish whether Respondent did, or did not, offer to bargain about these subjects prior to these changes.

Respondent defends that the RNs involved here are supervisors within the meaning of the Act, at least, since the Supreme Court decision on *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), and that issue was the subject of most of the testimony here.

D. *Supervisory Status of RNs*

There are three work shifts at the facility, 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m. The two principal areas of the facility are the 100 wing and the 200 wing, each containing about 60 residents. Either an RN or an LPN is in charge of each of these wings for each shift. The number of RNs present at any particular time depends on the shift and whether it was a weekday or weekend. In addition, the number of aides on each wing varies from about three on the 11 p.m. to 7 a.m. shift to about seven on the 7 a.m. to 3 p.m. shift. During the weekend shifts, there is usually only one RN per shift, and she is usually designated as the weekend supervisor. Grzelak testified that when she works 3–11 p.m. on the weekends she considers herself to be the weekend supervisor because she is the only RN in the building and an LPN cannot be in charge. Respondent also employs a 10 a.m. to 6 p.m. supervisor and a 3 to 11 p.m. supervisor during weekdays. Janet Cardella, who was employed as an assistant director of nursing for Respondent, testified: "[A]nd there is the same on weekends." All employees at the facility wear name tags; the 10 a.m. to 6 p.m. and 3 to 11 p.m. supervisors' name tags have their name, RN, and 10 a.m. to 6 p.m. or 3 to 11 p.m., supervisor. The other RN employees wear name tags with their names and only "RN."

Overall, the RN is the principal eyes and ears on her wing, making sure that the residents are comfortable, being fed, treated well, and that the aides on the wing are performing their jobs properly. She also administers the prescribed doses of medication to the residents. When the RNs arrive at the beginning of their shifts, they check reports on the residents in the wing: "If someone has had an incident, if someone was just newly admitted, if someone is on antibiotics, some behavioral problems that we have to watch for." The nurse in charge of the wing, whether an RN or an LPN, must fill out the assignment sheet for the aides on her wing for the shift. This sheet divides the wing into the number of aides working on the shift, and lists the room numbers for each aide, special needs, if any, for any of the residents, feeders (the residents who have to be fed), and extra duties for the aides. The nurse then fills in the name of the aide for each of these stations and tells the aides of any extra duty that

obtain witnesses or information on these allegations. No such request was made. Although counsel for Respondent did not reargue this claim in his brief, I should note that I continue to adhere to my determination granting counsel for the General Counsel's amendment.

they have to perform. The aides rotate these assignments on a regular basis, and they tell the RN which group they will be covering.

It is undisputed that RN staff nurses do not have the authority to hire, fire, transfer, promote, or discipline employees. An issue arose whether the RNs have the authority to effectively recommend the discipline of aides. Grzelak testified that if she sees that an aide has not properly performed a task she asks the aide to please perform the task. If that does not work, she calls over Donna Pratka, an RN and the 3–11 p.m. supervisor, and tells her of the situation. Pratka has told her to write up the incident on a disciplinary form, which she did and returned to Pratka. Grzelak makes no decision on what, if any, discipline would be given: "Donna brings it to the director of nurses, and then the director of nurses handles it from there." Cardella testified that if an RN discovers an aide engaged in misconduct, she notifies her supervisor, who writes up the incident. After that, the situation is handled by the administrator, the director, assistant director of nursing, and the supervisor. She testified that all improper activities of the aides had to be reported to the supervisor; the minor ones would be mentioned in passing, while the more serious incidents would be put in writing.

When the nurse needs assistance with a resident, she asks an aide to assist her. At times, she needs this assistance in an emergency and, on those occasions, she might yell for an aide to assist her. There are occasions when there is a shortage of aides reporting for work and, at the direction of the administrator or the director of nursing, the RN makes phone calls to obtain coverage for these positions. There was a list of individuals to call in these situations, and they had to first call the part-time employees in order not to incur overtime. If they could not obtain a replacement from that list, they were allowed to call anybody who was available to work in order to fill the vacancy. On these occasions, she can request, but not require, an aide to report for work.

Baker testified that, when she reports for work, her duties are:

> Count the narcotics and the syringes, get the report from the previous nurse, make rounds, give out medications, do treatments that are needed . . . paper work that's assigned. Go over the assignments with the nursing assistants. Take care of any emergencies that may arise.

She works the 11 p.m. to 7 a.m. shift with another RN on the other wing and, beginning at about 5 a.m., receives calls from employees who will not be reporting for work. When that occurs, she asks employees on her shift if they are interested in working an extra shift and, if that does not take care of the situation, she notifies either the supervisor or the assistant director of nursing of the problem, and then, "it's up to her." There are three aides who work on her wing on her shift. If an aide has not properly performed a function, Baker speaks to the aide and asks her what the problem is and shows the aide how to properly perform the task. This always corrected the situation and she has never had to report the situation to her superior at the conclusion of her shift. If a resident is under distress, she will call the resident's physician, who will prescribe additional medication or tell her to send the resident to the hospital.

Nora Cashman, who has been employed as an RN by Respondent since 1975, and is employed on the 11 p.m. to 7 a.m. shift, testified that she has three aides working on her wing. She fills in their names on the assignment sheet, "and usually I ask them what their assignments are because they rotate every week." She informs the aides of special assignments and needs of residents in their assigned areas. She counts the controlled drugs and syringes, does her midnight medications, and any required treatments for the residents on her wing. She does any required paperwork, such as ordering drugs or nursing supplies, and makes her rounds of the residents on the wing, and does her 5 and 6 a.m. medications. She speaks to the aides "to make sure that they have completed all of their assignments, if they've noticed any problems with any patients." If employees on the 7 a.m. shift call to say that they will not be reporting for work she will, at times, work with Baker by calling employees on Respondent's phone list in order to obtain employees to cover the shift, but if it were only one or two employees to replace, Baker will make the calls. If an aide on her wing did not properly perform an assignment, she would discuss it with the aide, and that would be the end of it. If that did not correct the situation, she would write down what had occurred, and give this note to her supervisor or the director of nurses the following morning.

Some of the RNs who testified filled out evaluation forms for aides employed on their wing. Grzelak testified that on one evening when she was working a double shift, Pratka, who "was running late one night and had to get home," asked her if she minded filling out two employee performance evaluation forms, and she said that she had no problem with that, and filled out the forms and left them on Pratka's desk. On the forms for these two employees she filled in the ratings for attendance, quality and volume of work, cleanliness, and character and appearance. She signed the forms and left them for Pratka. She does not believe that she filled in a rating for recommended continued employment. Baker testified that in about 1991 the director of nursing left her "a couple of check lists" for employee performance evaluations and she returned them to her upon completion. Cashman testified that, on occasion, the director of nursing or another supervisor has left her employee performance evaluations to fill out because she worked directly with these employees. On those occasions ("If I was asked to do them I did them"), she filled in the appropriate boxes and left it for the director of nursing. She did not answer the question, recommended continued employment: "I don't have the power to say whether somebody is recommended for employment or not. That's up to my director of nursing." Cashman identified nine of these employee performance evaluations that she prepared between 1980 and 1994.

Each wing has between three to about seven aides for each wing, depending on the shift. With approximately 60 residents on each wing, that means that the number of residents per aide varies from about 20 (on the 11 p.m. to 7 a.m. shift) to about 8 (on the day shift). Cardella testified succinctly about the aide's job duties:

> [T]hey take care of the total patient for the total time that they're there. They bathe them, they feed them, they change them, they dress them, they get them out of bed. They bring them to an activity if they're going,

> to physical therapy, if they're going. They feed them lunch, make sure they're changed and dried. And in the afternoon, if they have to take a nap, they're put in for a nap.

Baker testified that the aide's job duties on her shift are:

> To clean and change the patients, turn them as indicated, hydrate them as specially needed. We have numerous patients who don't sleep at night, so we have to monitor them if they're up walking, direct them back to their rooms. In the morning, certain ones may give showers, pass ice.

The aides usually perform these same duties on a daily basis. Grzelak testified that it is the duty of the aides to see that the residents are comfortable and taken care of. They change and toilet them, get them ready for dinner, bring them to dinner, and feed them, if necessary. They get them ready for bed, wash them, and answer calls from the residents during the night if they need anything.

IV. ANALYSIS

It is initially alleged that Respondent violated Section 8(a)(1) and (5) of the Act on about May 1 by transferring charge nurse duties from unit employees to nonunit employees. It is alleged that this was a mandatory subject of bargaining, and that the change was made without prior notice to the Union and without giving the Union an opportunity to bargain about the subject. The evidence establishes that in about June and July, two RNs, who had been employed by Respondent as charge nurses, were replaced by two LPNs in these positions. White testified that Respondent made these changes without prior notice to, or discussions with, the Union, and the Union filed a grievance about these changes on August 25. On about September 1, Respondent posted a notice at the facility stating that the charge nurse position on 100 wing was open to all LPNs wishing to apply. By letter to the Union dated September 3, counsel for Respondent stated that on September 1 he advised White that Respondent was contemplating eliminating the use of nonsupervisory registered nurses and was offering to negotiate the effects of that decision, ending that if the Union wished to discuss the matter, they should contact him. Charge nurses are included in the Board's certification and in the recognition provision of the Agreement. As the evidence establishes that the Respondent made this change in June, July, and September without prior notice to the Union, the initial issue is whether this was a mandatory subject of bargaining and had to first be discussed with the Union prior to implementation.

The rule regarding the transfer (or relocation) of work has progressed from *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), to *Otis Elevator Co.*, 269 NLRB 891 (1984), to *Dubuque Packing Co.*, 303 NLRB 386 (1991). These cases distinguish between management decisions which constitute mandatory subjects of bargaining and those that do not. As the Board stated in *Otis*, supra, which was "fine tuned" by *Dubuque*:

> Despite the evident effect upon employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor the union's ability to offer alternatives. [269 NLRB at 892.]

The result in the instant matter would be the same under either *Otis*, supra, or *Dubuque*, supra; Respondent presented no evidence to establish that giving the charge nurse position to the LPNs involved a change in the scope and direction of the enterprise or that the charge nurse position, as performed by LPNs, varied significantly from that job as performed by RNs. Clearly, this change from RNs to LPNs was made solely to save labor costs and for no other reason, and represented no other change in Respondent's operation. I, therefore, find that the transfer of this work to LPNs was a mandatory subject of bargaining.

Respondent defends that the charge nurses were supervisors within the meaning of the Act and that it could therefore unilaterally change their conditions of employment. In a strikingly similar matter, *Gratiot Community Hospital*, 312 NLRB 1075 fn. 2 (1993), the Board stated:

> The judge found that some of the nursing supervisors were statutory employees. We do not reach that issue. For, even assuming arguendo that all the nursing supervisors were statutory supervisors, the unilateral changes regarding them would nonetheless be unlawful. In this regard, we note that the parties have agreed to include all nursing supervisors in the unit, and they were covered by the contract at the time of the changes here. We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors.

Although I would find the charge nurses to be supervisors within the meaning of the Act, as they were covered by the Board's certification and Agreement, I find that Respondent could not lawfully change their terms or conditions of employment without prior bargaining. As the Board stated in *Arizona Electric Power Corp.*, 250 NLRB 1132, 1133–1134 (1980):

> Nor would our conclusion be affected by a finding that the load dispatchers themselves are supervisors or managerial employees, for once the Board has issued a certification covering a unit of statutory employees, it has a duty to protect the stability of the resultant bargaining relationship.

Because it "took the law into its own hands" rather than following an established lawful procedure, Respondent violated Section 8(a)(1) and (5) of the Act by transferring this unit work to LPNs.

It is next alleged that between June 15 and August 4, 1994, Respondent withdrew recognition of the Union as the collective-bargaining representative of its RN employees, and Respondent's answer admits this allegation. Additionally, Grzelak's testified, in answer to a question as to whether or not she was aware that the Respondent refused to deal with the Union any further: "Yes . . . on August 4th is when the announcement was made to us that they no longer would have anything to do with us, and that was it. Goodbye." Re-

spondent's defense to this allegation, and its defense to all the allegations here, is that it was entitled to withdraw recognition from the unit here because the nurses are supervisors within the meaning of the unit. As this was Respondent's defense to all the allegations, I shall discuss this allegation together with the allegation that Respondent unilaterally changed the terms and conditions of employment of its RN employees beginning in about July 1994 in violation of Section 8(a)(1) and (5) of the Act as these allegations are both dependent on a finding of whether these RN employees are supervisors within the meaning of the Act.

Section 2(11) provides that an employee is a supervisor within the meaning of the Act if he or she has the authority to engage in any one of the following:

> . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

There is no evidence whatsoever, that these RN employees, in their capacities as staff nurse or med nurse, have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees. The sole issue here is whether these employees could assign work to other employees, effectively recommend the discipline of employees, or direct the work of the employees, which exercise required the use of independent judgment.

Prior to the Supreme Court's ruling in *NLRB v. Health Care & Retirement Corp.*, supra, the Board had held that a nurse who responsibly directed other employees was not a supervisor within the meaning of the Act when that activity was performed for the well being of the patient, rather than in the interest of the employer. The majority of the Supreme Court disagreed with that approach:

> The Board has created a false dichotomy—in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer. We thus see no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.

The party alleging supervisory status, the Respondent here, bears of the burden of proving that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); and *Health Care & Retirement Corp. of America*, 306 NLRB 63 (1992). Based on *NLRB v. Health Care & Retirement Corp.*, supra, this supervisory determination is to be made in the "traditional" way, not based on special considerations of nurses acting in the interest of their patients. In addition, as Respondent has unilaterally changed the terms and conditions of employment for *all* of its RN employees, and has withdrawn recognition of the unit of *all* RN employees, Respondent has the burden of proving that *all* of its RN employees are supervisors within the meaning of the Act. *Ohio River Co.*, 303 NLRB 696, 714 (1991). This makes sense, for if an employer had a good-faith doubt of the employee status of some of its employees, it could file a unit clarification petition with the Board to determine the status of these employees without disrupting the conditions of employment of the other employees in the unit. However, Respondent here, by its memo to "All Staff RNs" dated December 15, 1994, stated that the Union no longer represented them because of their supervisory status. The issue therefore is whether Respondent was correct that all its RN employees were supervisors within the meaning of the Act. I find that it was not.

There are three shifts a day, 7 days a week at the facility. There are a number of admitted, or apparent, supervisors (within the meaning of the Act) present at the facility, and the number of such supervisors present at any particular time depends on the day of the week and the shift. The administrator, the director of nursing, and the assistant director of nursing, presumably, are present at the facility during the day shifts, Monday through Friday, and at other times as well. The charge nurses, whom I previously found were supervisors within the meaning of the Act, are also present at the facility at certain unspecified times. By the nature of their titles, the 10 a.m. to 6 p.m. supervisor and the 3 to 11 p.m. supervisor are present from 10 a.m. to 6 p.m. and 3 to 11 p.m., although it is not entirely clear whether they are also present at the facility on weekends. With this large number of supervisors present at the facility, I have no difficulty finding that the RNs in charge of 100 wing and 200 wing on the 7 a.m. to 3 p.m. and the 3 to 11 p.m. shift on Monday through Friday are not supervisors within the meaning of the Act. In addition to the fact that there are other supervisors present at the facility during these periods, it appears that a vast majority of the RNs time is spent caring for the residents on their wing. Very little of their time is spent directing the aides, whose number varies from about three to seven per wing and, when they give such direction, it does not appear to be the kind of direction that requires the exercise of independent judgment. While counsel for Respondent, in his brief, alleges that the RNs have the responsibility to make daily work assignments, the aides rotate assignments, and the RNs sole responsibility in that regard is to write the aide's name in the specific area that they are to cover. Counsel for Respondent's brief also states that the RNs have the responsibility to insure adequate staffing at the facility. In actuality, when they become aware of a shortage, or potential shortage of staff, they perform the ministerial function of calling employees to ask if they would be willing to work; they do not have the authority to insist that an employee report to work.

Counsel for Respondent, in his brief, also alleges that the RNs have the responsibility to monitor the aide's work to ensure proper performance, to counsel and discipline aides, and to resolve their problems and grievances. Since the RNs work directly above the aides they do monitor their work and counsel them, when necessary, to improve their work, but that does not make them supervisors within the meaning of the Act. The RNs who testified stated that if an aide was not properly performing his/her job, she would discuss the situation with the aide. If that did not correct the situation, she would notify her superior about the aide's difficulty. Baker, a particularly direct and credible witness, testified that when she saw that an aide in her wing was improperly performing

a task, she showed her the proper way to do it and that always corrected the situation. There is no evidence that these RNs are anything more than conduits of information to their superiors about aides on their shift, and there is no evidence that they can discipline, or effectively recommend the discipline of the aides. The evidence establishes, rather, that if they have difficulty with an aide's performance, they notify their superior of the facts, and that is the extent of their involvement. The superior makes a determination of what, if anything, to do.

Counsel for Respondent also alleges that the RNs have the responsibility to evaluate the performance of the aides; this is only partially correct. Grzelak, Baker, and Cashman each testified that they were asked by their superior to fill out portions of employee performance evaluation forms, and they did so. As Cashman testified: "If I was asked to do them I did them." Grzelak testified that she filled out, at least, two of these evaluations, Baker testified that she did "a couple" of them in 1991, and Cashman identified nine evaluations that she filled out between 1980 and 1994. Grzelak and Cashman testified that they did not answer the question whether the employee being evaluated was recommended for further employment. Cashman testified: "I don't have the power to say whether somebody is recommended for employment or not. That's up to my director of nursing." Baker was not asked if she answered that question on the evaluation form. This testimony convinces me that these employees did not have the authority to discipline or promote employees, or effectively to recommend such, as is implicit from counsel for Respondent's argument here. Rather, as the employees worked directly with the aides, and were most familiar with their work, they were occasionally asked for their opinion of the aides' work, and gave it. I, therefore, find that the fact that they occasionally filled out portions of employee evaluation forms does not make these employees supervisors within the meaning of the Act. I, therefore, find that Respondent's RN employees, both staff nurses and medication nurses, were not all supervisors within the meaning of the Act, and that by withdrawing recognition from the Union in about June and August 1994, Respondent violated Section 8(a)(1) and (5) of the Act.

The final allegation here is that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing certain terms and conditions of its RN employees beginning in about July 1994. The are a number of issues here: did, in fact, Respondent make these changes, were they mandatory subjects of bargaining, and were they made without prior notice to, or bargaining with, the Union. The credible, uncontradicted testimony of Baker and Grezelak, together with the November 8, 1994 memo to all the RNs, establishes that in November 1994 Respondent changed the unit employees' working hours, sick days, vacation days, holidays, personal days, health insurance, and discontinued its longevity pay on about July 15, 1994, its uniform allowance on about September 1994, its meal allowance in December 1994, and its premium pay for holidays in January and February 1995. Although there is no evidence one way or the other whether these changes were made with or without notice to the Union, such evidence is not necessary, since Respondent withdrew recognition of the Union on about June 15, 1994. As the Respondent had notified the Union that it no longer recognized it as the representative of its RN employees, it is not necessary to establish that these changes were made unilaterally, as Respondent had previously repudiated this bargaining relationship. Therefore, it was not incumbent on counsel for the General Counsel to establish that these changes were made without notice to, or bargaining with, the Union. Finally, it is difficult to imagine a valid argument that the subjects that Respondent changed were not mandatory subjects of bargaining. Days off from work, whether sick days, holidays, personal days, or vacation days, health insurance, and working hours clearly are terms and conditions of employment, as are uniform and meal allowances, longevity pay, and premium pay for overtime. *Singer Mfg. Co.*, 24 NLRB 444 (1940); *Herman Sausage Co.*, 122 NLRB 168 (1958); *Owens-Corning Fiberglass Corp.*, 282 NLRB 609 (1987); and *Trojan Mining & Processing, Inc.*, 309 NLRB 770, 771 (1992). In *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949), the court stated:

> [W]e think it can safely be said that the word "wages" in Section 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually.

I, therefore, find that by unilaterally changing the employees' sick days, vacation days, holidays, and personal days, as well as their health insurance coverage, work hours, uniform allowances and meal allowances, and longevity pay and premium pay for holidays, without prior consultation or bargaining with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act in the following manner:

(a) Unilaterally transferring charge nurse duties from RN unit employees to a different unit.

(b) Withdrawing recognition of the Union as the collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regularly scheduled part-time Registered Nurses, including charge nurses and the In-Service Coordinator, employed by the Employer at its Englishtown, New Jersey facility, but excluding all other professional employees, licensed practical nurses, office clerical employees, managerial employees, guards and supervisors as defined in the Act, employees represented by other labor organizations, and all other employees.

(c) Unilaterally changing certain terms and conditions of employment of its employees in the above described unit.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In this regard, I shall recommend that Respondent reassign RN employees to its charge nurse positions and immediately notify the Union, in writing, that this is being done. Respondent shall also notify the Union, immediately on receipt of this decision, that it is rescinding its withdrawal of recognition of the Union in June and August 1994, and that it recognizes the Union, and will bargain with the Union, for the employees in the above-described unit. Finally, I shall recommend that Respondent be ordered to notify the Union and all RN employees employed at the facility since July 1994, that it has rescinded the changes it made in the following terms and conditions of employment: sick days, vacation days, holidays, personal days, working hours, health insurance, uniform allowances, meal allowances, and longevity pay and premium pay for holidays, and that it will return to complying with these terms and conditions of employment as they existed prior to July 1994, and that it will reimburse the employees for any losses that they suffered as a result of this unlawful unilateral change, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]